1972

First National Bank In Grand Junction, A National Banking Association v. Ralph Osborne and Jim L. Hudson : Petition For Reheartng and Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST NATIONAL BANK
IN GRAND JUNCTION,
a National Banking Association,
Plaintiff and Respondent,

vs.

RALPH OSBORNE and
JIM L. HUDSON,
Defendants and Appellant.

Case No. 12804

PETITION FOR REHEARING AND BRIEF

Petition for Rehearing regarding
this Court's decision of November 17, 1972.

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IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST NATIONAL BANK IN GRAND JUNCTION, a National Banking Association, *Plaintiff and Respondent,* vs. RALPH OSBORNE and JIM L. HUDSON, *Defendants and Appellant.*	Case No. 12804

PETITION FOR REHEARING AND BRIEF

The Trial Court granted plaintiff, First National Bank in Grand Junction, a directed verdict upon the conclusion of the evidence, and defendant, Hudson, appealed. The Court reversed and ordered a new trial. Bank petitions this Court for a rehearing with respect to its decision of November 17, 1972, and urges the Court to permit additional oral argument with respect to the issues and facts.

The Bank believes that the Court's decision affirms the trial court's determination to the effect that Hudson's signature on the Loan Guaranty Agreement is geniune and that such fact, not having been disputed by Hudson in this appeal, is no longer in issue. If the foregoing statement is not correct, clarification is essential to the final disposition of this case.

Bank believes the Court may have been inadequately informed of the issues in this case and urges the Court to reconsider the issues as hereafter set out.

POINT I

THIS IS A CONTRACT CASE. THE DEFENSE RAISED IS FRAUD.

On page 2 of the decision the Court states: "We do not believe this is a case of fraud at all." The suit obviously involves a contract—a contract of guaranty; however, the entire thrust of Hudson's defense in the trial court and his appeal is based upon the theory of fraud in *factum*: that Hudson's signature was fraudulently obtained "by trick, ruse, slight of hand or other artifice. . . . " (Pages 32, 36, 41, 47, 56, 59 and 62 of Hudson's brief.) The Superior Court of New Jersey stated in 1961:

> The defense of fraud in the *factum* presents in theory a somewhat confused intermingling of tort and contract principles. At the heart of the assertion of *non est factum* is the absence of that degree of mutual assent prerequisite to formation of a binding contract; absent the proverbial "meeting of the minds" one cannot be said to have obligated himself in law and the purported transaction is regarded as void. This is basic contract doctrine. . . . (Cases cited.) Thus, where the signer of the instrument has been led to believe and does believe that he is signing something of a different character from the note he actually does inscribe, he has not in fact assented to the obligation represented by the paper.

The New Jersey Superior Court also held in the same case that the burden is upon the signer to prove his defense of fraud in the *factum*:

> The imposition upon the maker of the burden of establishing freedom from negligence, as an essential ingredient of his defense of fraud in the *factum*. . . (cases cited) . . . comprises more than empty verbiage. It is an explicit direction to the signer of an instrument to come forward either with evidence that the physical circumstances of the signing and representations made to him were so far removed from the realm of negotiable paper that he could not reasonably have foreseen or otherwise observed the subsequent effect of his signature, or to produce proof of legally mitigating circumstances in the form of his own physical or mental inability to comprehend the essence of the deception. Factors to be considered in mitigation may include physical disability (e.g. blindness), illiteracy, unfamiliarity with the English language, low general intelligence, unfamiliarity with commercial transactions, unavailability of interpretive aid, and misrepresentation by means of physical deception (e.g. substitution of papers by slight of hand). *Bancredit Inc. v. Bethea*, 68 N.J. Super. 62, 172 A.2d 10 at 41 (1961).

The rules of law on this point are generally discussed at 160 A.L.R. 1285 wherein some courts equate fraud in *factum* with forgery or other fraudulent acts which go to the heart of the contract—that there is no contract at all; however, there is one essential difference from a forgery. The signer cannot protect himself against a forger; but here when

in fact Hudson signed the document, Hudson could have averted the loss by not signing the Loan Guaranty Agreement. The courts sometimes refer to equitable arguments in these cases by saying that equity will not permit the defendant to assert that the agreement which he signed and upon which the plaintiff justifiably relied, to its damage, was a nullity. Where one of two innocent parties must suffer, the law should fall upon the one who by his misplaced confidence has made the fraud possible. *Judge of Probate v. Nudd*, 105N.H.311, 199 A.2d 296 (1964) and *Standard Surety & Casualty Co. v. Olsen*, 150 F.2d. 385 (8th Cir. 1945.)

Fraud in the *inducement* is another type of fraud which is often misunderstood, and in this case the theories have been intermingled. In the *inducement* theory the signer of the document knows he is signing the document but is induced to do so by fraudulent misrepresentations. Hudson in no respect contends this is an *inducement;* however the evidence at the trial suggests inducement in that Osborn solicited Hudson's financial cooperation to buy controlling interest in the Moab bank. In the inducement theory the general rule of law (no Utah cases) provides that the Bank may recover from Hudson unless Bank has knowledge of Osborne's fraud; however, even in the *inducement* theory Hudson has the burden of proving the fraud:

> "Misrepresentation or fraud by a principal to a surety are not chargeable to the obligee *ab-*

> *sent proof* that the obligee had notice thereof. *Chrysler Corporation v. Hanover Insurance Company*, 350 F.2d 652 (7th Cir. 1965), 38 Am.Jur.2d., page 1061, quoted infra.

Johnson v. Allen, 108 U. 148, 158 P.2d 134 (1945), while not involving a third party (the Bank, here) is a typical *inducement* case. In *Johnson v. Allen* this Court affirmed a directed verdict between parties to the alleged fraud (i.e. Osborne and Hudson), saying at P. 138:

> "The evidence of fraud must be clear, precise and indubitable; otherwise it should be withdrawn from the jury."

Can Hudson in this case have a lesser burden here against the innocent third party Bank than he would have if Hudson sued Osborne directly?

The Court in its decision acknowledges that the case is based upon the alleged fraud in *factum* of Osborne when, in the last full paragraph of the majority decision, the Court states: "If Hudson was imposed upon to sign a paper which he never intended to sign; or if he did not know his signature was being affixed to the Loan Guaranty Agreement . . . " Further, the Court in its decision, by ruling that the proffered testimony regarding Osborne's motive to procure the Hudson signature by "trick or fraud" was admissible confirms that this is a case of fraud in *factum*.

This being a case of fraud, it matters little whether in *factum* or *inducement;* Hudson has the

burden of pleading and proving the fraud, as required by Rule 9(b) of Utah Rules of Civil Procedure and the leading Utah case as to the elements of fraud *Oberg v. Sanders*, 111 U. 507, 184 P.2d 229 (1947), both of which are cited and quoted in Bank's brief previously filed. The Court determined that Hudson has a burden of going forward with the evidence; however, the Court makes the puzzling comment, " . . . the ultimate burden of showing an agreement is on the Plaintiff." Does this mean that Bank has the ultimate burden of proving the *absence* of fraud? If this is the ruling of this Court, it is clearly contrary to the authorities cited in this paragraph and Rule 1(4) of U.R.E. On the other hand, if Hudson has the burden of proving the fraud, then the excluded evidence is not relevant since it does not prove a fraud but merely proves that Osborne had a possible motive to commit a fraud. In no event does it prove the fraud clearly, precisely and indubitably as required by *Johnson v. Allen*, supra.

On page 2 of the Court's opinion it cites 38 Am.Jur.2d, *Guaranty*, Section 55, at page 1058. Immediately below this paragraph and on the same page it is provided:

> "The rules as to mistake, and relief against mistake, which apply to contracts generally apply to guaranty contracts. Thus, when the guarantor seeks to avoid liability on his promise of guaranty—the promise having been accepted by the creditor—on the basis that he (the guarantor) did not understand the legal

> significance of the document which he signed, the concept of objective mutual assent often precludes such defense. . . . The present rule requires the guarantor to read (at least if he can read), to inquire as to facts which would be apparent to reasonable persons, and to understand the legal significance of the document which he is signing. Any mistake which could have been corrected by due diligence and which is not the result of imposition practiced on the guarantor by the creditor (or someone for whom the creditor is responsible) is not a basis for rescinding the guaranty agreement if the creditor reasonably relied on the promise of the guarantor."

Further, in Section 58, page 1061, it is stated:

> "While the guarantor may successfully defend the creditor's action by showing that his execution of the contract of guaranty was procured by imposition which was practiced by the creditor, he cannot defeat a recovery by proof that he executed the instrument as a result of misconduct on the part of the principal debtor. On the contrary, if the creditor did not participate therein or have knowledge therein, recovery by him is not defeated by the fact that the debtor induced the guarantor to execute the contract by false representations or other misconduct."

The Court states: "When the plaintiff proved the signature on the Loan Guaranty Agreement to be that of Hudson, it made out a prima facie case and the burden of going forward with evidence would fall upon the defendant Hudson." Hudson totally failed to go forward with any evidence except his

self-serving declaration neither admitting nor denying the signature (R. 7 and R. 98), coupled with an offer of proof that Osborne had a motive to commit a fraud. No evidence was admitted or offered that Osborne did in fact impose upon Hudson or trick Hudson into signing the Loan Guaranty Agreement. If the Court's opinion in this case requires the Bank to prove the *absence* of fraud, the decision would permit any party to a written contract to at least have a jury pass on the issue whenever he states that he does not know how his signature got on the paper—notwithstanding a finding by the trial court that such person in fact signed the contract.

POINT II

OSBORNE'S STATEMENT TO A THIRD PARTY IS NOT ADMISSIBLE.

The Bank urges the Court to reconsider its opinion that the proffered testimony by Osborne to a third party, referring to Hudson: "I finally was able to hang one on him. I've been laying for him for some time and I finally got the chance to do it." is admissible in *this* case between Bank and Hudson. The Bank for this argument concedes that such statement would be admissible against Osborne if he were sued by Hudson; however, he has not been so sued, and Osborne is not in this case. The trial court, in addition to finding that the matter was hearsay and hence objectionable, also found that the statement was vague and indefinite. The person offering the testimony was not able to tie Osborne's

reference to the possibility that Osborne had defrauded Hudson. Is it not just as logical to speculate that Osborne was referring to the fact that Hudson had agreed to be his guarantor and was now being called upon to make good on his guaranty? Bank submits that its speculation is just as valid as Hudson's speculation that Osborne was making an admission that he had practiced a fraud (a civil wrong) against Hudson. If Rule 55 of Rules of Evidence is applicable (see Point IV), it requires that the material be *relevant* and that such evidence prove some material fact. The relevancy is speculative. Even assuming the Hudson view of the speculation, the evidence would not prove the fraud but would only tend to prove Osborne's motive or intent with respect thereto. For emphasis, the Bank again states: This is not a case between Hudson and Osborne!

POINT III

HUDSON'S OFFER OF PROOF THAT OSBORNE USED THE MONEY TO COVER UP DEFALCATIONS NEITHER PROVES NOR DISPROVES THAT HUDSON SIGNED THE LOAN GUARANTY AGREEMENTS NOR THAT HE WAS IMPOSED UPON BY OSBORNE IN SIGNING THE SAME.

For the purposes of argument the Bank acknowledges that in a case between Hudson and Osborne the proffered testimony would show that Osborne had a motive to obtain money; however, in this instance between the Bank and Hudson, such

evidence would not cast any light on the issue of whether Hudson was imposed upon by Osborne to sign the Loan Guaranty Agreement, not knowing it was such an agreement. The law throughout the United States is clear that if a person is imposed upon by fraud *in the inducement*, i.e. that he is induced by misrepresentation to sign a document (well knowing that he was signing the document), such a person may use such fraud to recover against the debtor (Osborne) but may not use such defense against the creditor (the Bank). 71 A.L.R. 1278. Thus the speculation of Hudson's dilemma: Not being able to offer evidence to the effect that he was fraudulently induced by Osborne into signing the agreement (since the law of inducement would not afford him a defense), Hudson has denied that he signed the agreement, and for his only proof offers the fact that Osborne had a motive—i.e. Osborne needed money to cover defalcations. The Bank urges the Court that the *inducement* speculation is as valid as the *factum* speculation. Neither possibility is more probable than the other. This being so, the proffered evidence does not tend to prove the ultimate fact and should not be received into evidence.

POINT IV

MISAPPLICATION OF RULE 55, UTAH RULES OF EVIDENCE.

The Court cites Rule 55, Rules of Evidence, to support its opinion that Osborne's statement to a third party, inferring the commission of a civil

wrong, is admissible to prove Osborne's alleged imposition upon Hudson. Bank urges that this view of Rule 55 is not correct. Rule 55 provides that evidence of one committed civil wrong may be introduced to show motive, intent (or other relevant material fact) relative to the commission of a *second* civil wrong. Here Hudson seeks to use the Osborne statement to a third party to prove the fraud in the first instance. Rule 55 does not cover that situation. If Hudson wants to have Osborne's statements in evidence, Hudson could either depose Osborne or join him. Hudson did neither.

POINT V

HUDSON DID NOT OFFER ADMISSIBLE EVIDENCE TO OVERCOME THE BANK'S PRIMA FACIE CASE THAT THE SIGNATURE WAS HIS.

If the Court affirms the preliminary statement by the Bank in this brief to the effect that the Hudson signature is genuine, this Point V is not relevant; however, if the question of the genuineness is still before the Court, it urges the Court to consider the point.

When Bank presented expert testimony to prove Hudson's signature, the burden of going forward with the evidence to disprove the signature shifted to Hudson. No evidence was presented by Hudson except his self-serving declaration neither admitting nor denying the signature. If there were genuine doubt as to the genuineness of the signature, expert witnesses for Hudson undoubtedly would have tes-

tified and the jury would then have had the opportunity of making a factual determination as to whether or not the signature was in fact Hudson's. In the absence of any such evidence on Hudson's behalf, the trial court came to the only conclusion that could follow from the facts—that Hudson signed the agreement. The Court's opinion needs clarification on this point. Does the Court dispute the finding of the trial court that Hudson signed the Loan Guaranty Agreement? On page 2 of its opinion the Court seems to agree with the trial court, saying: "When the plaintiff *proved* the signature . . . "; however, the ruling that "there was a question for the jury" begs the question: What question is there for the jury to decide?

POINT VI

BANK MET ITS "ULTIMATE" BURDEN OF SHOWING AN AGREEMENT. CLARIFICATION OF DECISION NEEDED.

The Court on page 2 of its decision states that the Bank, having made out a prima facie case, "the burden of going forward with evidence would fall upon the defendant Hudson. However, the *ultimate* burden of showing an agreement is on the plaintiff." The Bank urges that it met its *ultimate* burden by showing the signature of Hudson, an agreement in writing and consideration, the consideration being the loan to Osborne. 38 Am.Jur.2d, *Guaranty*, Sections 43 and 44, pages 1045 to 1047.

If the Court does not reverse its decision as

previously urged and continues its decision requiring a new trial, Bank urges the Court to clarify its decision with respect to burden of proof. Rule 76(a) of the Rules of Civil Procedure directs the Court to determine all questions of law necessary to the final determination of the case. Bank renews its position that the burden to prove the fraud in *factum* is on Hudson and that Bank in any event proved its "ultimate" burden. If the Court is of a contrary opinion, clarification of its decision with reference to burden of proof as to the alleged fraud practiced on Hudson is also necessary to aid the trial court in the retrial of this case.

Bank urges the Court that justice requires additional arguments in this case to more fully present the issues to the Court.

Respectfully submitted,

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